# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute and regulations involved | 2 |
| Statement | 4 |
| Argument | 8 |
| Conclusion | 13 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Eberlein* v. *United States*, 257 U.S. 82 | 8 |
| *Hargett* v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970 | 8 |
| *Keim* v. *United States*, 177 U.S. 290 | 8 |
| *O'Brien* v. *United States*, 284 F. 2d 692 | 10 |
| Statute and Regulations: | |
| Lloyd-LaFollette Act of 1912, 37 Stat. 539, 555, Sec. 6(a), as amended, 5 U.S.C. 652(a) | 2 |
| Civil Service Commission Regulations, Part 9, 5 C.F.R. 9.101 *et seq.* (1961 Rev.) | 8, 9 |
| 5 C.F.R. 9.102(a)(1) (1961 Rev.) | 3, 7, 8 |
| Miscellaneous: | |
| Internal Revenue Manual: | |
| Sec. 1983(1) | 11 |
| Sec. 1984 | 11 |
| Sec. 1986.2(1)(e) | 9 |




755-834—64——1

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 639

LAURA A. MCCLELLAN, PETITIONER

*v.*

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. A–2—A–3) is reported at 331 F. 2d 307.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1964 (Pet. App. A–4). A timely petition for rehearing was denied on July 30, 1964 (Pet. App. A–6). The petition for a writ of certiorari was filed on October 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether petitioner's removal from her position with the Internal Revenue Service was effected in compliance with the applicable procedural requirements.

### STATUTE AND REGULATION INVOLVED

Section 6 of the Lloyd-LaFollette Act of 1912, 37 Stat. 555, as amended, 5 U.S.C. 652, provides:

> SEC. 6 (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsec-

tion shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended, only if he so elects.

Section 9.102(a) of the Civil Service Commission Regulations, 5 C.F.R. 9.102(a) (1961 Rev.), provides:

* * * * *

(1) *Actions against employees.* (i) No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and for furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. In the decision that removal or other adverse action will be taken, the agency shall notify the employee of the reasons for the action and the effective date of the action; also of the right of the employee to appeal to the appropriate office of the Commission and the time limit within which his appeal must be submitted as provided in § 9.106. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or

other action shall be made a part of the records of the agency concerned.

* * * * *

## STATEMENT

Petitioner, a non-veteran former employee of the Internal Revenue Service, seeks review of a decision of the Court of Appeals for the Fifth Circuit which affirmed the district court's dismissal of her suit challenging her removal from the federal service. The pertinent facts are these:

On March 23, 1958, petitioner was assigned to the position of Revenue Officer (Intern), Grade GS–7, under the internal career development program of the Internal Revenue Service (R. 291–292).[1] This program was to last eighteen months and successful participants were eligible for promotion to the position of Revenue Officer (Journeyman), Grade GS–9 (R. 295–297). On October 14, 1959, petitioner was told that she would not receive such a promotion but would be reassigned to the Office Collection Force as a Tax-Examiner, Grade GS–7.

On October 23, 1959, petitioner was sent a notice of proposed removal by respondent R. L. Phinney, the District Director of Internal Revenue (R. 9–14). The notice contained nine charges of personal misconduct and proposed petitioner's removal from the Internal Revenue Service as of November 26, 1959. This notice of proposed removal was cancelled on November 12, 1959, because petitioner had appealed from her supervisor's decision not to promote her to the position of Revenue Officer (Journeyman) (R.

[1] "R" references are to the printed transcript of record in the Court of Appeals, which has been filed with this Court.

35–36). She was informed that the cancellation of the notice did not preclude the Service from issuing a new notice after the promotion appeal had been resolved (R. 36).[2]

In a letter dated December 10, 1959, petitioner was notified that she was to be removed from her position in order to promote the efficiency of the Internal Revenue Service (R. 36–42). The notice charged petitioner with (1) insubordination, (2) disrupting the work of co-workers by making loud and disparaging remarks, and (3) displaying resentment and uncontrolled temper when suggestions and constructive criticism were made by her supervisors. The District Director cited two specifications in support of the first charge and three specifications in support of both the second and third charges (R. 37–41).

The notice of proposed removal, which was received on December 14, 1959, advised petitioner of her right to "reply personally and in writing" to the charges made (R. 41). On December 21, 1959, petitioner sent a letter to the District Director, in which she replied at length to the charges (R. 250–276). The Acting District Director, upon consideration of the charges and petitioner's reply, notified petitioner on December 29, 1959, that she would be removed from the Internal Revenue Service, effective January 15, 1960 (R. 42–44). He advised her that she had

[2] The District Director, upon reviewing petitioner's promotion appeal, "found no substantiation for reversing" the decision of the supervisor and, therefore, denied her appeal (R. 35). On December 8, 1959, B. Frank White, the Regional Commissioner of Internal Revenue, also denied petitioner's appeal (R. 57–58). Under the provisions of Section 1868 of the Internal Revenue Manual, this decision was final.

the right to appeal this adverse determination to the Regional Commissioner of the Internal Revenue Service or to the Civil Service Commission (R. 43). Petitioner was also advised that should she appeal to the Commissioner on the ground that the proper procedures were not followed, or the discharge was effected for political reasons, or resulted from discrimination, the agency could not act on her case until the Commission had rendered its decision.

On January 6, 1960, petitioner appealed the decision of the District Director to B. Frank White, the Regional Commissioner of Internal Revenue. By a letter dated January 27, 1960, petitioner was notified that as she had filed an appeal on January 23, 1960, with the Eighth Civil Service Region (R. 302), her appeal before the agency would be held in abeyance pending the disposition of her case by the Civil Service Commission (R. 59).

Counsel for petitioner, in letters dated January 23, 1960, and January 30, 1960, requested the Director of the Eighth Civil Service Region to hold a hearing with respect to his client's appeal (R. 219–301). On February 10, 1960, counsel was informed that as petitioner was not a veteran, no hearing would be held by the Eighth Civil Service Region. It was suggested that he evaluate his client's case in light of the controlling Civil Service Regulations and that, should he desire to submit other briefs in addition to that dated January 30, 1960 (R. 220–239), he was at liberty to do so (R. 60–62).

The Regional Director of the Eighth Civil Service Region, after reviewing the record in petitioner's case and considering the extensive briefs filed on her

behalf, denied her appeal. He determined that petitioner was removed from the federal service in accordance with the procedures set forth in Section 9.102(a)(1) of the Civil Service Regulations, 5 C.F.R. 9.102(a)(1) (1961 Rev.) (R. 63–65). The Regional Director noted that the Commission had no authority to review the merits of a removal action in the case of a non-veteran. Petitioner was duly informed that she could appeal the Eighth Region's decision to the Board of Appeals and Review of the Civil Service Commission.

By letter of August 22, 1960, petitioner appealed to the Board of Appeals and Review, alleging that there was procedural error in her removal and that the penalty of discharge was excessive (R. 180–187). On November 30, 1960, the Board of Appeals and Review, upon consideration of the entire record, petitioner's contentions and the additional documents submitted, notified petitioner that (R. 65–70):

> Specification (1) of Charge I is not specific enough to provide you with a fair opportunity for refutation, and for this reason it has not been sustained. However, in view of the fact that Specification (2) definitely supports Charge I, the validity of Charge I as well as of Charges II and III is not effected. As a result of its consideration of your case, the Board has determined that the Internal Revenue Service complied with procedural requirements of Section 9.102(a)(1) of the Civil Service Regulations in effecting your removal. Accordingly, the decision of the Eighth U.S. Civil Service Region, contained in its letter of August 16, 1960, to you, is affirmed as amended herein.

On May 31, 1962, petitioner brought this action. In granting the government's motion for summary judgment, the district court found that petitioner "was removed from her Civil Service position as a Revenue Officer (Intern) GS–7 in the Houston, Texas Office of the Internal Revenue Service on January 15, 1960, in accordance with the applicable law and regulations, and that all applicable procedural requirements were met in effecting her discharge" (Pet. App. A–1). The court of appeals affirmed *per curiam*, finding "no error" in the agency's removal of petitioner (Pet. App. A–2—A–3).

## ARGUMENT

The decision of the court below is clearly correct. Since the petition presents no question of general importance and there is no conflict between the circuits, further review is not warranted.

It is well-settled that matters relating to the discharge of federal executive employees are within the discretion of the employing agencies and that judicial review of such matters is limited to a determination of whether the dismissal was effected in compliance with the applicable statutory and regulatory procedures. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970. In this case, in conformity with Section 6(a) of the Lloyd-LaFollette Act of 1912, 5 U.S.C. 652(a), Part 9 of the Civil Service Commission Regulations, 5 C.F.R. 9.101, *et seq.* (1961 Rev.), and the pertinent provisions of the Internal Revenue Manual, petitioner received a written notice of the charges preferred against her (R. 36–42), an opportunity to

file a reply thereto (R. 41, 250–276), and a written decision stating the reasons for her removal (R. 41–42). She was also informed of her right to appeal within the Agency and to the Civil Service Commission (R. 43–44).

Petitioner contends, nevertheless, that certain procedural requirements were not complied with by the removing agency. Specifically, she argues that she was not given the required written notice of her right to reply to the letter of charges both in person and in writing, that she should have been afforded an investigation by the Inspection Office of the Internal Revenue Service, and that her removal was arbitrary and inequitable (Pet. 3–11). These arguments are plainly without merit.

(1) Section 1986.2(1)(e) of the Internal Revenue Manual provides that all notices of proposed adverse actions, involving employees protected under Part 9 of the Civil Service Regulations, 5 C.F.R. 9.101, *et seq.* (1961 Rev.), should advise the employee (veteran and nonveteran) that (Pet. App. A–15):

> * * * [H]e has a right to reply both in person *and* in writing, and to furnish affidavits and evidence in support of his answer. The advance notice will specifically indicate the name and address of the person to whom the reply may be made and that the reply must be made within the time specified in the notice—usually 10 calendar days.[8]

[8] The word "and" is underlined in the text of the manual. It should be pointed out that in Internal Revenue Service Regional Office Memorandum No. 19–9 of May 11, 1954, there is a requirement that the notice of proposed removal state that "the employee has the right to answer the charges *personally or in writing*, and that he may furnish affidavits in support of his

The notice of proposed removal, which was sent to petitioner on December 10, 1959, stated that "you may reply personally and in writing within ten calendar days from the receipt of this letter showing cause if any why removal action should not be taken" (R. 41). Petitioner asserts that this notice did not inform her of "her rights to reply *'both in person and in writing'* (emphasis supplied) as required by the Internal Revenue Regulations * * *" (Pet. 3).

A reasonable interpretation of the December 10, 1959 notice is that the petitioner could have replied personally and she could also have replied in writing to the charges preferred. See *O'Brien* v. *United States*, 284 F. 2d 692, 694 (Ct. Cl.). In any event, when petitioner received the first (October 23, 1959) notice of proposed removal—which contained the identical phrase "personally and in writing" as the December 10th notice—she went to Austin, Texas, and discussed her proposed removal with the District Personnel Officer, James L. Funderburgh, Jr. There, according to Mr. Funderburgh, when petitioner was informed of her appeal rights, she replied that she did not want to use the oral procedure but preferred to write her answer because she could cover the points better and might lose her temper with the District Director.[4] In view of this conversation, there can

answer" (emphasis added) (R. 85). With respect to that provision, it seems clear that the agency intended that its employees be notified that they had the right to reply to a letter of charges in either one of two ways.

[4] The District Personnel Officer's affidavit, which was attached to the respondents' reply brief in the district court, may be found in the appendix to the brief which respondents filed in the court of appeals.

be no doubt that petitioner, upon reading the December 10th notice, knew that she could reply to the letter of charges in person as well as in writing.

(2) Section 1984 of the Internal Revenue Manual provides that where it is alleged that an employee has engaged in criminal, infamous, dishonest, immoral or disgraceful conduct, an investigation must be undertaken by the Inspection Office of Internal Revenue Service and not by the employee's supervisors (R. 116–117). In this case, none of the charges preferred against petitioner—insubordination, disrupting the work of co-employees, and displaying resentment and uncontrolled temper towards her supervisors—come within the categories of misconduct set forth in Section 1984. Rather, the offenses for which petitioner was removed are plainly of the kind which are listed in the Internal Revenue Manual as being "administrative in nature" and therefore require no investigation on the part of Inspection Office (I.R. Manual § 1983 (1); R. 115–116). Moreover, contrary to petitioner's contention (Pet. 10–11), the Internal Revenue Service never relied upon the August 1957, incident involving petitioner and a taxpayer to justify her removal from the federal service. Thus there was no reason to have this incident investigated by the I.R.S. Inspection Office.

(3) Petitioner argues that her removal was "arbitrary and inequitable" on several grounds, all of which, while presented as procedural violations, go to the merits of her discharge (Pet. 4–10). Even were the merits open to judicial re-examination, petitioner's contentions would be baseless. While petitioner claims that the penalty of removal was too

severe, in that no other disciplinary actions had previously been imposed upon her (Pet. 4–7), the record discloses that in October 1957, petitioner was verbally warned by her supervisor about openly displaying her displeasure and dissatisfaction in office operations (R. 313). Furthermore, in October 1958, petitioner was admonished by the collection group supervisor for losing her temper and going into a tirade during a conference concerning unsatisfactory work ratings (R. 73–74). In addition, on April 1, 1959, petitioner received a memorandum reprimanding her for persistently interrupting others during business hours by talking loudly about matters, both of a business and personal nature, in which they had no interest or concern (R. 240). Thus, on at least three occasions prior to the institution of removal proceedings, petitioner was disciplined for on-duty conduct.[5]

[5] Petitioner also contends that her removal was inequitable and arbitrary on the ground that specification 1 in Charge III contained "exaggerations and mis-statements" (Pet. 7–9). There is no basis for this contention. (See Memorandum from Joe Jamar to Miss McClellan dated October 13, 1958.) (R. 73–74). Similarly, petitioner's contention that "little effort" was made "to adhere strictly to the facts * * * in *Specifications 2 and 3 of Charge II*" (Pet. 9) is without substance. (See Memorandum from Joe Jamar to Miss McClellan dated April 1, 1959.) (R. 240–241.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
JOHN W. DOUGLAS,
*Assistant Attorney General.*
ALAN S. ROSENTHAL,
LAWRENCE R. SCHNEIDER,
*Attorneys.*

NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964